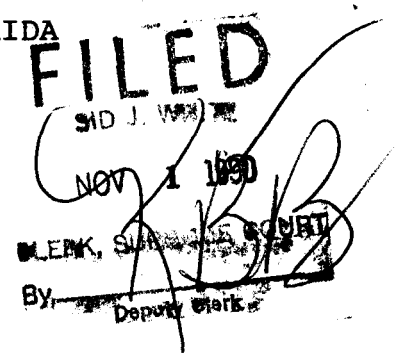
IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,778



PUBLIC HEALTH TRUST OF DADE COUNTY, FLORIDA, d/b/a JACKSON MEMORIAL HOSPITAL,

Petitioner,

vs.

MAGDA MENENDEZ and AMERICO MENENDEZ, as the natural parents, legal guardians and next of friend of ADARIS MENENDEZ, a minor,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, OF FLORIDA, THIRD DISTRICT
Florida Bar No. 191273

RESPONDENTS' BRIEF ON JURISDICTION
(with Appendix)

GEORGE W. CHESROW
LAW OFFICES OF RUIZ & CHESROW
3127 Ponce de Leon Boulevard
Suite 200
Coral Gables, Florida 33134
(305) 443-4949

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LAW OFFICES OF RUIZ & CHESROW, 3127 PONCE DE LEON BLVD., SUITE 200, CORAL GABLES, FLORIDA 33134 • (305) 443-4949

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STATEMENT OF THE CASE AND FACTS

The respondents, Magda Menendez and Americo Menendez, prefer to rely upon the facts as recited by the Third District Court of Appeal in its decision. (App 2-7)[1] The petitioner's statement of the case and facts is not entirely correct nor complete. For example, petitioner erroneously states at page two of its brief that the issue of which statute applies to the Public Health Trust was determined on a motion to dismiss the complaint. In actuality, the issue was determined on a motion for summary judgment. (App 4,7) More importantly, in its statement of the case and facts petitioner has chosen to rely upon and emphasize the Third District's holding applicable to the University of Miami and Dr. Mary O'Sullivan, who are no longer parties to this proceeding. The relevant holding which must be examined for the purpose of determining whether jurisdictional conflict exists is the Third District's pronouncement of the rule of law applicable to the Public Health Trust which operates Jackson Memorial Hospital. The Third District stated:

> As to Jackson, however, we hold that the trial court erred in applying the provisions of section 95.11(4)(b). Section 768.28(11), Florida Statutes (Supp. 1980), which provides a four-year limitation <u>without a period of repose</u> for the filing of a negligence action against a state agency, is the appropriate

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[1] The symbol "App" refers to the appendix to the brief of Petitioner, the Public Health Trust of Dade County doing business as Jackson Memorial Hospital. The symbol "RA" will be utilized to refer to Respondents' appendix to this brief. All emphasis in this brief is added unless otherwise indicated.

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> statute of limitations in negligence actions against Jackson, see Jaar; Whitney v. Marion County Hosp. Dist., 416 So.2d 500 (Fla. 5th DCA 1982), a state agency. See Whitney. Finding that genuine issues of material fact exist as to when plaintiffs knew or should have known of either the injury or of the possible negligence [court's footnote omitted] for 768.28(11) purposes, we remand for the trier of fact to determine this issue.
>
> (App 7)

Petitioner contends that this holding is in conflict with this Court's decision in Carr v. Broward County, 541 So.2d 92 (Fla. 1989).

SUMMARY OF THE ARGUMENT

Jurisdictional conflict does not arise in this case because the two cases sought to be compared by petitioner are distinguishable in controlling factual elements, and the points of law settled by the two cases are not the same. Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962). In the case at bar, the applicability of Section 768.28(11) to a public hospital such as Jackson Memorial Hospital was raised and decided by the Third District, whereas in Carr the issue was never raised nor decided. The Third District held in Menendez that Section 768.28(11) applies to a hospital which operates as a state agency. The Carr decision never passed upon and is totally silent as to this issue. This Court in Carr was presented with the entirely different issue of whether Section 95.11(4)(b) "was constitutionally enacted and bars the Carr's medical malpractice action under the circumstances of this cause." Carr, supra, p. 95. When the "points of law settled by the two cases are not the same, then no conflict can arise." Kyle, supra.

The gist of petitioner's jurisdictional argument is that conflict may be inferred or implied from the fact that Broward County appeared as a named party along with several private physicians, in a decision in which this Court upheld the constitutionality of Section 95.11(4)(b). Petitioner's jurisdictional argument should fail because this Court has held that conflict must be express and direct, and that "inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." Department of Health & Rehabilitative Services v. National Adoption Counseling Services, Inc., 498 So.2d 888, 889 (Fla. 1986).

Moreover, the mere presence of Broward County as a defendant in the Carr case does not give rise to jurisdictional conflict on the basis of so called dicta as suggested by petitioner in its jurisdictional brief (page 6, f.n. 3), because this Court made no pronouncements in Carr, one way or the other, as to which statute properly applies to a public hospital.

The applicability of a particular statute of limitations, or avoidance thereof, is an affirmative defense, which, if not raised, is waived, and cannot thereafter be considered by an appellate court. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). Petitioner conceded in the lower court that the applicability of Section 768.28(11) was never raised nor decided in Carr. (RA 10-11) Petitioner also conceded that Section 768.28(11) applies to the Public Health Trust. (RA 5) The Third District's decision applying Section 768.28(11) to the Public Health Trust does not conflict with the decision in Carr.

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ARGUMENT

I

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN CARR v. BROWARD COUNTY, 541 So.2d 92 (Fla. 1989) ON THE SAME QUESTION OF LAW.

The decisions in Menendez and Carr do not involve the same question of law either in the announcement, or application thereof to the respective facts of each case. Because the controlling facts are materially different in the two cases as to the issues which were raised and passed upon in the respective decisions, jurisdictional conflict cannot be implied from the mere fact that both cases involved actions for medical malpractice against public hospitals.

In Kyle v. Kyle, 139 So.2d 885 (Fla. 1962), a decision relied upon by petitioner in its brief (page 6), this Court explained that where the results reached in decisions differ because the same issues were not before the court in the respective cases, jurisdictional conflict will not arise even though there may be factual similarities between the two cases. The facts in Kyle are illustrative. In Kyle the district court held that an antenuptial agreement executed outside the state without witnesses was not valid in Florida with respect to dower rights. Conflict was alleged with the decision in Northern Trust Co. v. King, 6 So.2d 539 (Fla. 1942) where this Court enforced a similar antenuptial agreement executed without witnesses outside the state. Although the cases appeared to involve similar facts, this Court nevertheless held that jurisdictional conflict could not arise

because in Kyle the formal validity of the antenuptial agreement was raised, whereas in the Northern Trust case, "the question was neither raised by the record nor discussed in the decision." Kyle, supra, p. 887. This Court held that conflict cannot arise where different results are reached because the same question of law was neither raised nor discussed in the decision which is relied upon for alleged conflict. As stated in Kyle:

> If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise.

Petitioner cannot point to any language in the Carr decision which mentions or alludes to Section 768.28(11) of the Florida Statutes, the four year statute of limitations applicable to state agencies adopted in 1975 when sovereign immunity was waived with respect to tort claims. Rather, petitioner requests this Court to imply that conflict exists because Broward County was named as a defendant in Carr along with "the treating physicians." Carr, supra, p. 93

In 1980, article V, section 3 of the Florida Constitution was substantially changed. Jurisdictional conflict must now be express and direct. Express means to "represent in words," or "to give expression to." Jenkins v. State, 385 So.2d 1356 (Fla. 1980) Under this definition, implied conflict can no longer serve as a basis for jurisdiction. Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986) (hereinafter referred to as National Adoption).

In National Adoption, the Fourth District held that HRS did not have statutory standing to enjoin unlicensed child-placing

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agencies. This Court initially accepted jurisdiction because the Third District had decided on the merits to uphold injunctions obtained by HRS against similar agencies in two prior cases. However, this Court thereafter dismissed the petition for review because the Fourth District's decision was based on a lack of standing, and HRS had conceded that this issue had not been raised in the two cases decided by the Third District. This Court held:

> While HRS concedes that standing was not an issue before the Third District Court in the Adoption Hot Line cases, it argues that the "inferential" or "implied" conflict inherent in the decisions supports this Court's jurisdiction.
>
> ... As we recently noted in Reaves v. State, 485 So.2d 829, 830 (Fla. 1986), "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." In otherwords, inherent or so called "implied" conflict may no longer serve as a basis for this Court's jurisdiction.

Petitioner conceded in the lower court that the applicability of Section 768.28(11) to a public hospital was never raised in the Carr case (RA 10-11)[2]

Petitioner contends that the presence of Broward County as a party to the Carr case creates dicta that Section 768.28(11) no longer applies to public hospitals. Dicta is a statement or comment concerning some rule of law or legal proposition not necessarily involved nor essential to a determination of a case.

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[2] This Court may look to the proceedings below as well as the briefs for the limited purpose of determining whether issues were raised or waived. See, Universal Underwriters Ins. Co. v. Morrison, 15 F.L.W. S552 (Fla. Oct. 18, 1990)

See, Black's Law Dictionary, p. 540 (4th Ed.). A review of the Carr decision reveals that there does not appear to be any dicta in the decision, and certainly none which concerns or touches upon the rule of law announced in Menendez. Petitioner seems to be suggesting that dicta can arise from the name of a party. However, dicta can only arise from the words of this Court not the name of a party chosen by the plaintiff. Moreover, only the parties had the power to decide what issues would be raised below, and presented to this Court for determination. As this Court held in Dober v. Worrell, 401 So.2d 1322 (Fla. 1981), the statute of limitations is an affirmative defense which must be raised by the party seeking to claim it. Similarly, an avoidance must be raised in a reply. The affirmative defense of the statute of limitations or an avoidance thereof is waived, if not properly raised, and cannot thereafter be considered by an appellate court. Dober, supra, p. 1324 While the applicability of Section 768.28(11) was never raised nor decided by this Court in Carr, the issue was squarely raised in the case at bar. Moreover, the Public Health Trust in its motion for summary judgment conceded that "the applicable Statute of Limitations governing this case is Florida Statute § 768.28 ...." (RA 5) The Third District's decision in Menendez does not conflict in any respect with this Court's decision in Carr.

II

EVERY COURT WHICH HAS PASSED UPON THE ISSUE HAS HELD THAT SECTION 768.28(11) APPLIES TO A PUBLIC HOSPITAL, AND THEREFORE REVIEW IS NOT NECESSARY IN ORDER TO PROVIDE UNIFORMITY IN THE APPLICATION OF THE LAW.

The courts that have addressed the issue have uniformly held that the four year statute of limitations provided by Section 768.28 of the Florida Statutes applies to a hospital which operates in Florida as a state entity. In the case at bar, the Third District relied on Whitney v. Marion County Hospital District, 416 So.2d 500, 501 (Fla. 5th DCA 1982) where the Fifth District held:

> The statute of limitations for a medical malpractice action under section 95.11(4)(b), Florida Statutes (1977), is two years from the date the incident occurred or was discovered, but no more than four years from the date of the incident. However, Chapter 95 also specifically provides that where a different statute of limitations is provided elsewhere in the statutes, that different statute of limitations will apply. § 95.011, Florida Statutes (1977). On its face, therefore because the Hospital is admittedly a State agency, chapter 95 unambiguously requires application of the limitation period provided in § 768.28(11) for tort actions against the state. See DuBose v. Auto-Owners Insurance Company, 387 So.2d 461 (Fla. 1st DCA 1980).

The same rule of law was relied upon and applied to public hospitals in Public Health Trust of Dade County v. Knuck, 495 So.2d 834, 837 (Fla. 3d DCA 1986) where the Third District held that as to Jackson Memorial Hospital "the applicable statute of limitations" is § 768.28(11). Accord, Florida Patient's Compensation Fund v. S.L.R., 458 So.2d 342, 343 (Fla. 5th DCA 1984); Whack v. Seminole Memorial Hospital, Inc. 456 So.2d 561, 564 (Fla. 5th DCA 1984).

The Third District's decision in Lloyd v. North Broward Hospital District, 15 F.L.W. 1989 (Fla. 3d DCA July 10, 1990) does not conflict with these decisions because as in Carr, the applicability of Section 768.28(11) was not raised or discussed in

the court's decision. Additionally, alleged intradistrict conflict cannot be relied upon to assert jurisdiction in this Court.

The rationale behind the decisions holding that Section 768.28(11) applies to public hospitals is found in Beard v. Hambrick, 396 So.2d 708, 711 (Fla. 1981) where this Court held that the four year statute of limitations contained in Section 768.28 applies to wrongful death actions against a state agency as opposed to the two year statute of limitations provided by Section 95.11:

> We believe that the legislature intended that there be one limitation period for all actions brought under section 768.28. We base this belief on the prerequisite notice provisions of this section and the need to have a uniform period for actions against government entities. See DuBose v. Auto Owners Insurance Co., 387 So.2d 461 (Fla. 1st DCA 1980).

The Legislature amended Section 768.28 in 1988 to provide two exceptions to the four year statute of limitations applicable to state agencies so that after October 1, 1988 an action for contribution must be commenced within the time provided by section 768.31(4), and "an action for damages arising from medical malpractice must be commenced within the limitations for such an action in s. 95.11(4)." Section 768.28(12), Florida Statutes (1989) However, from January 1, 1975 to October 1, 1988 actions for medical malpractice against state hospitals were governed by the four year statute of limitations provided by Section 768.28.[3]

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[3] This action was commenced against the Public Health Trust in 1985, before the amendment took effect. A limitation of action will not be applied retroactively especially to an action that was filed prior to the adoption of the amendment. The intent must be express, clear, and manifest in the statute before retroactive application will be permitted, and in any event plaintiffs' rights vested when the action was filed in 1985. See, Foley v. Morris, 339 So.2d 215 (Fla. 1976) Petitioner concedes that the amended statute may not be retroactively applied to this case. Petitioner's brief, page 9, f.n. 7.

CONCLUSION

The petition for discretionary review should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of October, 1990, to: AURORA ARES, ESQUIRE, THORNTON, DAVID, MURRAY, RICHARD & DAVIS, P.A., 2950 S.W. 27th Avenue, Suite 100, Miami, Florida 33133.

Respectfully submitted,

LAW OFFICES OF RUIZ & CHESROW
Attorney for Respondents
3127 Ponce de Leon Blvd., Suite 200
Coral Gables, Florida 33134
Telephone: (305) 443-4949

By: George W. Chesrow
George W. Chesrow